No. 84-1340

In the
Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, ET AL.,
PETITIONERS,

v.

JACKSON BOARD OF EDUCATION, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of Amici Curiae, The Greater Boston Civil Rights Coalition, and The Civil Liberties Union of Massachusetts, in Support of Respondents

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INTEREST OF AMICI CURIAE

Interest of Greater Boston Civil Rights Coalition

The Greater Boston Civil Rights Coalition (the "Coalition") is a multi-racial, multi-religious and multi-ethnic, voluntary, unincorporated association of 35 Boston area civil rights organizations, governmental representatives and community organizations. For the past six years, the Coalition has led efforts to end race discrimination in education and employment and to combat racial violence.

The Coalition views voluntary affirmative action as a critical means to achieve its goal of creating racial, religious, and ethnic harmony and equality.

The Coalition was organized in 1979, after a group of white youths shot and paralyzed Darryl Williams. This racial attack was one in a long series of incidents of

racial violence that grew out of the tensions created from court-ordered desegregation. The arduous history and violent aftermath of court-ordered desegregation in Boston has reinforced the importance of creating voluntarily-negotiated remedies for discrimination.

Following his election, Governor Michael S. Dukakis held a series of meetings with the Coalition to structure his Administration's programs for equal employment opportunity. As a result, the Commonwealth of Massachusetts adopted Executive Order 227, which set minority hiring goals of 20% for racial minorities and 50% for women. The Governor established a Civil Rights Working Group of key officials in his administration who had responsibility for programs which affect race relations and economic opportunity. The Governor

appointed a member of the Coalition as the only non-governmental representative on this body. (A letter from Governor Dukakis concerning work with the Coalition is attached as Appendix A.)

Similarly, the Coalition has worked with the City of Boston for strong voluntary affirmative action in city employment. Following his election, Mayor Raymond L. Flynn met with the Coalition to discuss his administration's civil rights programs. As a result of these discussions, the Flynn Administration created a city office of affirmative action and adopted an affirmative action plan with hiring goals of 30% for racial minorities and 50% for women in all jc' categories. (A letter from Mayor Flynn concerning the Coalition is attached as Appendix B.)

The Coalition has also been active in educational efforts. It has supported implementation of the Boston school desegregation orders, and has worked to eliminate racial prejudice through educational efforts within the schools and in the community at large.

Interest of Civil Liberties Union of Massachusetts

The Civil Liberties Union of Massachusetts ("CLUM") is a non-profit membership organization whose purpose is the preservation and promotion of the civil rights and liberties guaranteed by law. CLUM has long been involved in the struggle to combat racial discrimination, both in education and employment, and to implement affirmative action plans that can meaningfully remedy racism's continuing effects.

In the early and mid-1970's CLUM was active in efforts to enforce the Massachusetts racial imbalance law (Mass. Gen. Laws ch. 71 §37D), a statutory attempt to remedy longstanding patterns of racial segregation in the public schools. CLUM participated as amicus curiae in two cases involving application of the law to school segregation in the City of Springfield.[1]

Resistance to desegregation under the racial imbalance law, and continuing defiance of constitutional mandates by public officials, ultimately led to court-ordered desegregation in Boston and to a horrifying era of racial violence from which the City has still not yet fully recovered.[2] This

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[1] School Committee of Springfield v. Board of Education, 365 Mass. 215 (1974), 366 Mass. 315 (1974), cert. denied, 421 U.S. 947 (1975).

[2] See School Committee of Springfield, supra, 366 Mass. at 325-338; Smith, "Two Centuries and Twenty-Four Months: A Chronicle of the Struggle

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experience has given CLUM and other Massachusetts civil rights organizations a unique understanding of the importance of voluntarily-negotiated remedies for the lingering effects of past discrimination.

CLUM has continued to support affirmative action remedies, public and private, voluntary and court-imposed, through lobbying, education, and participation in litigation.[3]

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to Desegregate the Boston Public Schools," in Limits of Justice: The Courts' Role in School Desegregation, 25-113 (H. Kalodner & J. Fishman eds. 1978).

[3] See, e.g., Firefighters Union, Local 718 v. Boston Chapter, NAACP, 461 U.S. 477 (1983); Devereaux v. Geary, No. 84-2004, slip op. (1st Cir. June 24, 1985).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with an issue left unanswered by such cases as United Steelworkers of America v. Weber, 443 U.S. 193, 99 S.Ct. 2721 (1979) and Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978): whether a voluntary plan to safeguard achievements in remedying substantial and chronic underrepresentation of minority faculty, adopted in collective bargaining with a public employer, in the absence of a judicial or legislative finding of past discrimination, is consistent with the Equal Protection Clause of the Fourteenth Amendment. This issue is of paramount importance, as state and local governments have emerged to account for ever-greater percentages of total employment in the United States. Most Federal

circuit courts have upheld public affirmative action plans by applying the intermediate scrutiny standard articulated by Justices Brennan, White, Marshall and Blackmun in Bakke,[4] together with an extension to public employers of Weber's holding that no finding of past discrimination is necessary for a private employer voluntarily to adopt affirmative action measures[5] (see infra). Amici urge this Court to adopt this standard of constitutional review, which appropriately permits plans such as that collectively adopted by the Jackson Board of Education and its

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[4] Under this standard, a govermental racial classification designed to further remedial purposes will be upheld upon Equal Protection review if it (1) serves an important governmental objective and (2) is substantially related to achievement of this objective. Bakke, 438 U.S. at 359.

[5] Weber, 443 U.S. at 200.

teachers. It is critical that public employers share with private employers the ability voluntarily to "eliminate traditional patterns of racial segregation." Weber, 443 U.S. at 201. Moreover, the affirmative retention provision in this case should be upheld under the strictest standard of constitutional review.[6] However, Amici submit that the strictest standard of constitutional scrutiny does not apply here because (1) this plan was voluntary and bilateral, not imposed by unilateral state action, thus distinguishing it from Bakke; (2) governmental action to

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[6] Under the strictest standard of constitutional scrutiny, a state racial classification does not violate the Equal Protection Clause of the Fourteenth Amendment if it is "a necessary means of advancing a compelling governmental interest." Fullilove v. Klutznick, 448 U.S. 448, 496, 100 S.Ct. 2758 (Opinion of Powell, J., concurring), citing Bakke, supra, 438 U.S. at 299.

safeguard the equal employment opportunities of minorities in occupations traditionally closed to them furthers the purpose of the Fourteenth Amendment; (3) a different constitutional analysis is required when the claimants are not members of a class historically subject to discrimination; and (4) the history of Congressional and Supreme Court policy encouraging local governmental (and private) voluntary remedial action dictates a standard of review that permits such voluntary local action.

This case is doubly important because it arises in the context of public schools. As will be argued below, the goals of the affirmative retention provision at issue here were school desegregation goals as well as affirmative employment goals, tailored to the needs of school

children. Desegregating faculties is a compelling government interest, if the nation's public school children are to grow up free of the burden and stigma of racial segregation. Minority teachers provide vital and irreplaceable role models for minority children, and bring a unique and necessary diversity to public education.

I. THE STRICTEST LEVEL OF CONSTITUTIONAL SCRUTINY DOES NOT APPLY TO VOLUNTARY AFFIRMATIVE RETENTION PROVISIONS ADOPTED IN COLLECTIVE BARGAINING AGREEMENTS BETWEEN PUBLIC EMPLOYERS AND EMPLOYEES.

Amici submit that the strictest level of constitutional scrutiny is not appropriate to affirmative retention provisions adopted in collective bargaining agreements between public employers and employees.

A. Strict Scrutiny Does Not Apply Because this Affirmative Retention Provision Was Entered into Voluntarily and Bilaterally.

This Court has never applied the strictest level of scrutiny to affirmative action plans with express remedial purposes, voluntarily entered into by the affected class. The admissions program in Bakke was, although voluntary, unilateral state action. It did not have the express agreement of the affected class of student applicants. The plan in Firefighters Local Union No. 1784 v. Stotts, ____ U.S. ____, 104 S.Ct. 2576 (1984), was court-imposed, and encroached on an existing seniority system, whereas here the disputed provision was collectively bargained for and ratified numerous times by the teachers' union, and

is in derogation of no existing independent seniority system.[7]

Analysis of this affirmative action plan must begin with the fact that it was bilaterally entered into by the Jackson Board of Education and the union representing the City's teachers, the Jackson Education Association. The plan was ratified in 1972, and the provision at issue was retained in successor collective bargaining agreements ratified in 1973, 1975, 1977, 1980, 1983, and 1985.

The bilateral nature of the plan is of decisive importance. Voluntariness on the part of the teachers renders applicable the

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[7] The voluntariness of the plan on the part of the teachers is not in issue. And see, e.g., Tangren v. Wackenhut Services, 658 F.2d 705, 707 n.2 (9th Cir. 1981) (viewing a collectively-bargained affirmative retention plan as plainly voluntary and the "question of voluntariness as a false issue") (emphasis added).

policy considerations of Weber, and diminishes the importance of the state action found in such cases as Bakke. This is not a case where a governmental entity such as the Board of Regents in Bakke unilaterally imposed a preferential admissions program without the agreement of student applicants. Here, the teachers themselves have ratified the plan seven times. The teachers' union has even instituted litigation to enforce the very layoff provisions now under attack, Jackson Education Association v. Board of Education of the Jackson Public Schools, Civil Action No. 4-7234D (E.D. Mich. 1974), and has successfully prosecuted a state court action which upheld the validity and constitutionality of the layoff clause. Jackson Education Association v. Board of Education of the Jackson Public Schools, Jackson County Cir.

Ct. No. 77-011484(Z) (1977) (Joint App. 39-53). Thus, the teachers of Jackson have collectively ratified and sought to enforce this layoff provision against the very board that defends the provision as Respondent here.

The board which was compelled by the Jackson teachers' union to apply the layoff provision at issue is now under attack for having done so. Such litigation threatens to forestall or even to cripple the ability of public employers and employees to achieve voluntary racial desegregation and remedial affirmative action.

As Justice Brennan noted in Bakke:

> Our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.

Id., 438 U.S. at 361.[8] Application of the strictest standard of constitutional review in the context of public collective bargaining agreements would in effect make judicial intervention "a prerequisite to action," and deprive one of the country's largest employment sectors of the power voluntarily to "eliminate traditional patterns of racial segregation." Weber, 443 U.S. at 201.

[8] See also United States v. City of Miami, 614 F.2d 1322, 1342 (5th Cir. 1980) ("As we see it, the best hope is provided by negotiation and compromise among all affected persons and parties. Where minorities and women have been underrepresented in the past . . . even those innocent of any wrongdoing must temporarily bear some of the burden" (emphasis added).

B. Strict Scrutiny Does Not Apply Because Governmental Action to Safeguard the Equal Employment Opportunities of Minorities in Occupations Traditionally Closed to Them Furthers the Purpose of the Fourteenth Amendment.

In Weber, this Court determined that Congress, in enacting Title VII of the Civil Rights Act of 1964,[9] "did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." Id., 443 U.S. at 207. Furthermore, the affirmative action plan in Weber was held to "mirror" the purposes of Title VII. Weber, 443 U.S. at 208 (Brennan, J., delivering the Opinion of the Court) (emphasis added). It would be anomalous for state and local governments to be deprived of goals and powers which Congress

[9] 42 U.S.C. §2000e et seq.

can permissibly give to private employers, each in the name of Equal Protection. Such disparate treatment of public and private collective bargaining agreements could give rise to cynicism as to the very goals which the Fourteenth Amendment and Title VII further. If voluntary affirmative action plans by private employers mirror the purposes of Title VII, and if the purposes of Title VII further those of the Fourteenth Amendment, then public voluntary affirmative action plans must be held to further the purposes of the Fourteenth

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[10] In the Equal Employment Opportunity Act of 1972, Congress amended Title VII to bring public and educational employees within its scope. The legislative history shows that Congress amended Title VII pursuant to its power to enact "appropriate legislation" under Section 5 of the Fourteenth Amendment to carry out the Amendment's purposes. According to the House Report that accompanied the bill,

> The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the

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Amendment.[10] Otherwise government will be perceived as hypocritical in its fur-

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> Constitution . . . . The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination. Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill.

H.R. Rep. No. 238, 92d Cong., 2d Sess. 2, reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2154 (emphasis added). Senator Javits agreed:

> Of all the provisions in the bill, this has the most solemn congressional sanction, because it is based not on the commerce clause but ... on the Fourteenth Amendment. This is a paramount right created for all Americans.

S. Bill No. 2515, 92d Cong., 2d Sess., reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, Bureau of National Affairs, Inc. at 1173 (1973). Senator Williams was also in accord. Id. at 1115.

Congress' purpose in applying Title VII to the public sector to further the purposes of the Fourteenth Amendment was the same as its purpose in enacting Title VII originally: to open employment opportunities for minorities in occupations traditionally closed to them.

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therance of the Fourteenth Amendment: what Congress strives to achieve, local governments may not; what private employers may achieve in the furtherance of constitutionally permissible objectives, public employers may not.

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Weber, 443 U.S. at 203. Congress' reason for extending Title VII to educational institutions was that, as Representative Perkins stated in support of the amendment, "discrimination against minorities... is as pervasive in the field of education as in any other area of employment." H.R. Bill No. 1746, 92d Cong., 2d Sess. (1972), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, supra, at 301. As Senator Javits argued in support of the amendment, quoting from the U.S. Commission on Civil Rights' 1969 Report on Equal Opportunity in State and Local Government (Exhibit 1 to the Legislative Record of the 1972 amendment): "state and local governments have failed to fulfill their obligation to assure equal job opportunity." S. Bill No. 2515, supra, at 1173. These are remedial, Fourteenth Amendment purposes. The public voluntary affirmative retention plan here must therefore be held to mirror not only the purposes of Title VII, as in Weber, but also the purposes of the Fourteenth Amendment, under the aegis of which Congress extended Title VII to public employers and educational institutions.

Public employers must be allowed, consistent with the Fourteenth Amendment, to adopt the same goals and to enter into the same voluntary affirmative action plans as private employers. Indeed, because state governments are charged by the Fourteenth Amendment to carry out its remedial function, arguably governments should have more, not less, freedom to implement affirmative action programs. To make public employment versus private employment the dividing line between impermissible and permissible voluntary affirmative action plans is anomalous and constitutionally indefensible.

C. Strict Scrutiny Does Not Apply Because the Petitioners Are Not Members of a Class Historically Subject to Discrimination.

Where the parties claiming discrimination are not members of a class historical-

ly subject to discrimination, the Constitution does not require that strictest level of scrutiny which has been called "'strict' in theory and fatal in fact." Bakke, 438 U.S. at 361-62 (Brennan, J.)[11] As the

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[11] When evaluating a group's claim of entitlement to special judicial protection, this Court has in the past "emphasized the characteristics of that class, referring frequently to the 'traditional indicia of suspectness': whether the class is 'saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the ... political process.' San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); see Graham v. Richardson, 403 U.S. 365, 372 (1971); United States v. Carolene Prods. Co.. 304 U.S. 144, 152 n.4 (1938). Repeatedly the Court has refused to apply strict scrutiny where these characteristics are absent. See, e.g., Johnson v. Robinson, 415 U.S. 361, 375 n.14 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. I, 28 (1973). See also Kahn v. Shevin, 416 U.S 351, 357 (1974) (Brennan, J., dissenting)...." The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57 (1978) (emphasis added). Clearly, petitioners here have none of the "traditional indicia of suspectness" which would require the strictest scrutiny.

Sixth Circuit stated in Detroit Police Officers' Association v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981):

> [A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain. . . .

Id., 608 F.2d at 697 (emphasis added). Indeed, in those cases where Federal circuit courts nominally apply "strict scrutiny" to affirmative action programs,

most courts in fact apply the standard articulated in Justice Brennan's opinion in Bakke, together with Weber's holding that no specific finding of past discrimination by a particular employer is necessary, to uphold such programs against constitutional attack.[12]

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[12] See, e.g., Kromnick v. School District of Philadelphia, 739 F.2d 894, 903 (3rd Cir. 1984); Kirkland v. New York State Department of Correctional Services, 711 F.2d 1117, 1130-32 (2d Cir. 1983), cert. denied, 104 S.Ct. 997 (1984); Bratton v. City of Detroit, 704 F.2d 878, 884 n.18 (6th Cir. 1983), cert. denied, 104 S.Ct. 703 (1984), reh'g. denied, 104 S.Ct. 1431 (1984); La Riviere v. Equal Employment Opportunity Commission, 682 F.2d 1275, 1278-79 (9th Cir. 1982); Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), cert. denied, 454 U.S. 1124 (1981); Local Union No. 35 v. City of Hartford, 625 F.2d 416, 432 (2d Cir. 1980), cert. denied, 453 U.S. 913 (1980); Detroit Police Officers' Association v. Young, supra.

In the few Federal court cases concerning collective bargaining agreements, strictest scrutiny has not been applied. See, e.g., Marsh v. Board of Education, 581 F. Supp. 614 (E.D. Mich. 1984), aff'd., 762 F.2d 1009 (6th Cir. 1985) (upholding collective bargaining agreement implemented to remedy "substantial underrepresentation" and employing "reasonable" remedial

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Amici urge that these courts are correct in upholding public voluntary affirmative action programs by applying standards of review less strict than the standard applied to claims by persons who are members of a class historically subject to discrimination.

D. The History of Congressional and Supreme Court Policy Encouraging Voluntary Local Governmental and Private Remedial Action Dictates a Standard of Review that Permits Such Action.

It is the clear policy of the courts and of Congress to encourage local, voluntary efforts to remedy the lingering effects of a history of racial discrimina-

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plan); Britton v. South Bend Community School Corp., 593 F. Supp. 1223 (N.D. Indiana 1984) (upholding collective bargaining agreement's "no minority lay-off" clause which was "reasonably related" to "important governmental objective" of "remedying the racial imbalance among teachers").

tion. As the Court stated in Green v. County School Board, 391 U.S. 430, 437-38, 88 S. Ct. 1689, 1693-94 (1968), discussing the import of Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954): "School boards... were... clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" (citations omitted) (emphasis added). Titles VI and VII of the Civil Rights Act of 1964 "put great emphasis on voluntarism in remedial action." Bakke, 438 U.S. at 364 n. 38. Congress extended Title VII of that Act to state and local governments in 1972, and expressly intended this extension to encourage local governments to correct minority underrepresentation in furtherance of the purposes of the 14th Amendment. See

Section I.B., supra. A primary purpose of the Emergency School Aid Act was "to encourage 'the voluntary elimination, reduction or prevention of minority group isolation'" in public schools, including the racial isolation of faculties. Board of Education v. Harris, 444 U.S. 130, 132-33, 100 S. Ct. 363, 365 (1979).

It is thus essential to permit and to encourage state and local government's voluntary affirmative action programs. These programs are based on clear Congressional policy favoring local, voluntary action,[13]

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[13] As Representative MacGregor stated in his remarks to the House shortly before the final vote on Title VII of the Civil Rights Act of 1964: "[P]roblems raised by these controversial questions [e.g., preferential treatment in employment] are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." 110 Cong. Rec. 15893 (1964), quoted in Weber, 443 U.S. at 208, (Blackmun, J., concurring) (emphasis added). See also the House Report accompanying the Civil Rights Act: "There is reason to believe... that national leadership

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and on this Court's prior interpretations of the race-conscious and remedial purposes of the Thirteenth and Fourteenth Amendments.

II. THE AFFIRMATIVE RETENTION PROVISION IS CONSISTENT WITH THE EQUAL PROTECTION CLAUSE UNDER THE APPROPRIATE STANDARD ARTICULATED BY JUSTICE BRENNAN IN BAKKE.

If anything has been established by the judicial history of racial desegregation and affirmative action, it is that, as Justice Blackmun stated in Bakke, "[i]n order to get beyond racism, we must first take race into account . . . and in order

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provided by enactment of [the Civil Rights Act] will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination." H.R. Rep. No. 914, 88th Cong., 1st Sess. 1, p. 18 (1963), as quoted in Weber, 443 U.S. at 204, (Brennan, J., delivering the Opinion of the Court).

to treat some persons equally, we must first treat them differently." Id. 438 U.S. at 40. A majority of the Justices of this Court have, in Bakke and in Fullilove v. Klutznick, 448 U.S. 448, 100 S.Ct. 2758 (1980), opined that not every race-conscious measure is constitutionally impermissible, and that states may implement voluntary plans to eradicate the effects of past discrimination. Indeed, as Justices Brennan, White, Marshall and Blackmun noted in Bakke, "no decision of this Court has ever adopted the proposition that the Constitution must be colorblind." Bakke, 438 U.S. at 336.

In Bakke, four out of five Justices who reached the constitutional issue concluded that "racial classifications designed to further remedial purposes... must serve important governmental objec-

tives and must be substantially related to achievement of those objectives." Id., 438 U.S. at 359. Amici urge that these two constitutional requirements are the appropriate standards in this case. They will be addressed in turn.

A. The Affirmative Retention Provision Serves an Important Governmental Objective and Meets the Appropriate Standard of Constitutional Review.

In Bakke, Justice Brennan wrote that "our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large." Id., 438 U.S. at 369. According to Justice Brennan, the goal of

remedying the effects of past discrimination, even in the absence of official findings of past discrimination, is constitutionally permissible, so long as "there is a sound basis for concluding that minority underrepresentation is substantial and chronic...." Id. at 362. Under this standard, the affirmative retention program at issue clearly serves an important governmental objective, and thus meets the appropriate standard of constitutional "ends" review.[14]

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[14] As argued above, it is crucial that this case involves a collectively-bargained affirmative retention clause. In the only Federal cases addressing the constitutionality of such collectively-bargained plans, the "substantial and chronic underrepresentation" standard has been applied to uphold "affirmative retention" clauses similar to that here. In Britton, supra, the court relied on Justice Brennan's test in Bakke, i.e., "that an articulated purpose or plan serve an important governmental objective." Id., 593 F. Supp. at 1229, citing Bakke, 438 U.S. at 361. Relying on Bakke, the District Court took the position that Amici urge here: that the constitutional review of the

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As argued above, most Federal circuit courts have properly upheld public affirmative action programs by applying Justice Brennan's standard in Bakke, together with Weber's holding that no finding of past discrimination is necessary. See Section I.C., supra.

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"ends" of an affirmative retention plan collectively bargained-for is satisfied if the Court finds that "there is a sound basis for concluding that minority underrepresentation is substantial and chronic...." Id. at 1230 (emphasis added).

The Britton court properly refused to "read Stotts, supra, to require direct findings of discrimination in a voluntary affirmative action plan." Britton at 1230. Where the "'no minority layoff clause' in the collective bargaining agreement . . . was approved by the [teachers' union] not once but twice," the court properly found Stotts inapplicable. Id. at 1230-1231. The Court required only "some showing of previous underrepresentation of minorities. . . ." Id. This standard is proper for collectively-bargained plans, and is clearly met by the record in Wygant. Amici urge application of this standard, where the affirmative retention provision in Wygant has been ratified by the teachers not twice, but seven times. See also Marsh, supra, 581 F. Supp. at 620-22.

In the leading case of Detroit Police Officers' Association v. Young, supra, the Sixth Circuit applied this standard to uphold the constitutional validity of an affirmative promotions policy voluntarily adopted by the Detroit Police Department. Id., 608 F.2d at 687.

The court concluded that the police department's finding that minority underrepresentation on the force was substantial and chronic was sufficient to justify the use of a unilaterally-imposed affirmative promotions policy. Quoting Bakke, 438 U.S. at 362, the Sixth Circuit held that an important government interest is established if there is "a sound basis for concluding that minority under-representation is substantial and chronic...." Young, 608 F.2d at 694.

No judicial finding of past discrimination was required. To require a judicial determination of past discrimination prior to institution of a voluntary plan "would be 'self-defeating' and would 'severely undermine' voluntary remedial efforts." Young, supra, 608 F.2d at 689-90, quoting Bakke, 438 U.S. at 369 (emphasis added).[15]

The record in this case shows that prior to the adoption of the collective bargaining agreement, minority underrepresentation on the faculties was indeed substantial and chronic.[16]

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[15] See also The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 140 (1979): "Requiring a school or other institution to forestall adopting an affirmative action program until an official finding of discrimination has been made permits the effects of violations to continue unabated, and wastes resources of both the court and litigants."

[16] The Board found that "by the school year 1968-69, black students made up 15.2 percent of the total student population, while black faculty members constituted only 3.9 percent of the

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Amici urge that the goal of safeguarding results achieved in remedying substantial and chronic underrepresentation must be held to be an important government objective, sufficient under the Constitution to justify public voluntary affirmative action plans.

Petitioners and the Justice Department argue that the school board was not competent to make a finding of past discrimination sufficient to justify the affirmative retention plan, and that comparison of faculty representation to a student body benchmark was an improper basis for the

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total teaching staff. While the percentage of minority students remained relatively constant (15.9 percent in 1971), the percentage of minority faculty members increased, but only to 5.5 percent in 1970-71 and 8.3-8.8 percent in 1971-72," the year the plan was adopted. Wygant, 746 F.2d at 1156.

board's finding. The student body benchmark is not at issue in this case. Nor should competence be at issue here, because no finding of past discrimination is constitutionally required; but even if it is held to be at issue, the school board was competent and its finding was proper.

1. The Board's Competence to Make Findings of Past Discrimination Is Irrelevant to the Validity of the Affirmative Retention Provision.

In Bakke, Justice Powell stated that the Board of Regents of the University of California was not competent to make the finding of past discrimination that would have justified a racial preference in medical school admissions as a remedial measure. Id., 438 U.S. at 305. By contrast, in this case the competence of the board to make findings of past discrimination is

irrelevant, first, because no such finding is required here, and second, because the board's competence is neither an issue before the Court, nor an issue properly to be considered in the context of a collective bargaining agreement.

As argued above, substantial and chronic underrepresentation, and not a finding of past discrimination, is a sufficient basis on which to uphold the goal of a collectively-bargained affirmative retention program as serving an important governmental objective.[17] Because no

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[17] In both Bakke and Fullilove, an official finding of past discrimination was required because the purported goal of the challenged plan was to remedy that discrimination. In Bakke, Justice Powell held that the goal of fostering a diverse student body was a constitutionally permissible one even without a finding of past discrimination because, under the narrower justification, the goal of the plan was not to remedy past discrimination. No finding of past discrimination is required in this case for precisely the same reason: because it is not the goal of the provision at issue to remedy

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finding of past discrimination in the particular school system is necessary, the competence of the school board to make such a finding is not an issue.[18] Moreover,

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past discrimination, but to safeguard results achieved in remedying substantial and chronic underrepresentation.

[18] The board's competence should not be in issue for a second reason: because the layoff provision was voluntarily ratified by the teachers' union.

In Justice Powell's opinion in Bakke, a finding of past racial discrimination, made by a competent body, was required in order to protect the interests of non-minority students who did not consent to the racially preferential policy such a finding was to justify. Here, by contrast, the racially preferential layoff policy was voluntarily adopted by both the board and the union whose members the policy would directly affect. The board's competence to make findings of past discrimination is irrelevant to this case because such a finding is not a prerequisite to the sort of voluntarily-negotiated collective bargaining agreement that embodies the layoff policy. Cf. Tangren v. Wackenhut Services, 658 F.2d 705, 707 (9th Cir. 1981) ("It is settled that seniority rights are not vested property rights, and that these rules can be altered to the detriment of any employee or group of employees by a good faith agreement

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the school board is patently competent to make a finding either of past discrimination or of substantial and chronic underrepresentation.

2. Even if the Board's Competence Were at Issue, the Board Is Competent to Make the Requisite Findings.

In Bakke, Justice Powell stated that the Board of Regents was not competent to make broad findings of past societal discrimination sufficient to justify its

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[18] (Footnote Continued From Previous Page)

between the company and the union.... This is particularly true where the changes are undertaken to provide greater representation of minorities") (emphasis added); United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969). The teachers bargained to alter their seniority rights in the event of budgetary layoffs. They did not bargain to require a finding of past discrimination as a precondition to altering their seniority rights. The teachers ratified the provision modifying their seniority rights, ratified the remedial goal of the provision, and ratified the board's finding of underrepresentation. The board's competence, therefore, should not be in issue.

racially preferential admissions policy. Id., 438 U.S. at 307-310.

By contrast, in this case, the board and the teachers together implemented a provision designed to safeguard gains which had been achieved in remedying minority faculty underrepresentation in the unique context of a school system. The board and the union sought not to remedy broad societal discrimination, as in Bakke, but to safeguard gains against underrepresentation with which they were intimately involved on a daily basis and about whose negative effect on school children they had first-hand knowledge. The board, as the entity charged by state law to oversee the composition of the faculty, was competent to make findings of such minority underrepresentation. Bakke, 438 U.S. at 363-64.

This Court has recognized the "special competence of school districts to adopt race-conscious remedies." Kromnick, supra, 739 F.2d at 906. See, e.g., McDaniel v. Barresi, 402 U.S. 39, 41-492 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). Indeed, as this Court stated in Swann:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

Id., 402 U.S. at 16. No coherent line can be drawn which renders a board competent to conclude that a student body should reflect the approximate racial proportion for the district as a whole, but incompetent to conclude that a faculty should reflect that

same approximate proportion. Each conclusion embodies the same kind of findings and educational policies.

Furthermore, no coherent line can be drawn between a school board's competence to determine race-conscious remedies in "desegregation" cases and in "affirmative action" cases. These labels cannot disguise that the same kind of findings and educational policies are at issue in Wygant as in Swann. This Court has struck down "measures that would have limited a school system's power to choose race-conscious remedies." Kromnick, supra, 739 F.2d at 907. See, e.g., Washington v. Seattle School District No. 1, 458 U.S. 457 (1982); Swann, supra.

Amici therefore submit that the board was competent to make a finding of substantial and chronic underrepresentation, and

to choose a reasonable race-conscious plan to safeguard the gains previously made to remedy that underrepresentation.[19]

3. The Student Body Benchmark Is Not in Issue.

The issue whether the board properly used a minority student ratio in finding "substantial underrepresentation" was not presented to the District Court below, and is therefore not properly in issue here. Wygant, 746 F.2d at 1156 n.1. Furthermore, the layoff provision, which is the only provision of the collective bargaining agreement here being challenged, makes no mention whatever of a student body benchmark. The only provision of the col-

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[19] The board was also competent under applicable precedent to make findings of past discrimination. If the Court determines that such a finding is necessary, this case should be remanded for such findings. Amici submit, however, that such findings are not constitutionally required.

lective bargaining agreement at issue here is Article XII, which provides that "at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." This layoff provision does not equate the percentage of minorities that may be laid off with the percentage of minorities in the school district. Thus, even on the merits, the student body benchmark is not in issue here.

B. The Affirmative Retention Provision Is Substantially Related to the Objective of Safeguarding Achievements in Remedying Substantial and Chronic Underrepresentation of Minority Faculty.

Under the standard adhered to by four Justices in Bakke, the constitutional validity of a race-conscious state program that serves an important government objective depends on whether the means chosen to

attain that objective are substantially related to it. Id., 438 U.S. at 359. In this case, the affirmative retention provision is substantially related to the important, constitutionally permissible objective of maintaining achieved levels of minority faculty representation so as not to undermine the accomplishments of an affirmative action program.

The "substantial relation" test of Bakke requires that the affirmative action plan (1) not unduly stigmatize any discrete group or individual; and (2) use racial classifications reasonably in light of its objectives. Id., 438 U.S. at 372-376.

1. The Affirmative Retention Provision Does Not Stigmatize any Discrete Group or Individual.

No constitutionally impermissible stigma attaches where, as here, a racial

classification is used to retain qualified minorities in order to safeguard achievements in remedying minority under-representation. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing the burden' by innocent parties is not impermissible." Fullilove, supra, 448 U.S. at 484 (opinion of Chief Justice Burger).

Amici support the Sixth Circuit's analysis of stigma in the context of remedial racial classifications:

> First, though undue stigma must be cautiously guarded against, a plan designed to remedy the effects of past discrimination is not invalid merely because some individuals not in any way culpable with respect to past discriminatory acts must bear the brunt of the racial preference. Valentine v. Smith, 654 F.2d at 511....
>
> This case is "not a simple mirror image of a case involving claims of discrimination against minorities." Detroit Police Officers Association v.

Young, 608 F.2d at 697. We are dealing with a white majority which has traditionally benefited from the prior systematic discriminatory practices which have given rise to the need for the kind of affirmative action program the Detroit Police Board implemented. The self-esteem of whites as a group is not generally endangered by attempting to remedy past acts militating in their favor, the situation only arises in the first instance because of their social dominance. The purpose of this program is to aid blacks, it is not aimed at excluding whites--the fact that whites have equal access to the lieutenant ranks and that the plan is only temporary clearly support this conclusion. In such instances, the white majority is simply not being subjected to what amounts to a constitutionally invidious stigma.

> Second, we believe that where those hired or promoted by operation of affirmative action are qualified for the position in which they are placed, no constitutionally impermissible stigma attaches. Valentine v. Smith, supra.

Bratton, supra, 704 F.2d at 891 (emphasis added). The affirmative retention provision in Wygant attaches no constitutionally impermissible stigma. There is no claim

before the Court that the minority teachers benefited by the provision were not well-qualified--a consideration found decisive by the Sixth Circuit in Bratton, the Eighth Circuit in Valentine, and the Fifth Circuit in Miami, supra.

Nor does any stigma in fact attach to the non-minority teachers whom this policy affects. The self-esteem and societal treatment of non-minority teachers, a group that has not been historically "saddled with disabilities" or "relegated to...a position of powerlessness" (San Antonio Independent School District v. Rodriquez, supra, 411 U.S. at 28), is not endangered by a policy that attempts to preserve gains made against the lingering effects of racial discrimination that has historically militated in their favor. Bratton, supra, 704 F.2d at 891.

Finally, the voluntary, bilateral nature of the affirmative retention policy is crucial to constitutional analysis of this issue as well. The teachers' collective ratification of the affirmative retention provision, at a time when their union was overwhelmingly white, obviates any claim that the provision unduly stigmatizes white teachers.

2. The Affirmative Retention Provision Uses Racial Classifications Reasonably in Light of Its Objectives.

What convinced the Brennan plurality in Bakke that the affirmative action plan there was reasonable in light of its objectives, was the fact that "there are no practical means by which [the board] could achieve its ends in the foreseeable future without the use of race-conscious measures." Id., 438 U.S. at 376. The same is

true here: there are no practical means, other than a race-conscious provision, by which the board could safeguard the achieved level of minority faculty representation in the face of budgetary constraints necessitating teacher layoffs. The race-conscious remedy here was not only reasonable, but necessary.[20]

While the criteria set out by this Court in Weber to test the validity of voluntary private affirmative action plans were not originally applied in a constitutional context, many of the Federal

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[20] Cf. Morgan v. O'Bryant, 671 F.2d 23 (1st. Cir. 1982), cert. denied, 459 U.S. 827, reh'g. denied, 459 U.S. 1059 (1983) (nearly-identical affirmative retention orders held "necessary to safeguard the progress toward desegregation painstakingly achieved;" without them black representation would have fallen to percentages existing before plan went into effect, and such a result "could not be countenanced." Id., 671 F.2d at 27-28 (citing Green v. County School Board, supra, 391 U.S. at 438-39) (emphasis added).

circuits have treated these criteria as applicable in the constitutional review of public affirmative action plans.[21] Thus, these courts test the reasonableness of a voluntary public affirmative action plan according to standards announced in the Title VII context in Weber. Id., 443 U.S. at 208. The affirmative retention provision here meets each of the Weber criteria.

The affirmative retention provision does not unnecessarily trammel the interests of white teachers. The plan was voluntarily agreed upon by both the school board and the teachers themselves. It does not require the hiring of new black teachers to replace discharged white

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[21] See, e.g., Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 484-85 (6th Cir. 1985); Bratton, supra, 704 F.2d at 892; Young, supra, 608 F.2d at 694. See also Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 976-977 (1st Cir. 1982).

teachers; it does not even require that only white teachers be laid off.

Nor does the plan create an absolute bar to the advancement of white teachers. The advancement of white teachers not laid-off proceeds along its usual lines, as does the advancement of those laid-off white teachers who are in time called back to teach. Such collectively-bargained modification of seniority, particularly in order to increase minority representation, is clearly permissible. Tangren v. Wackenhut Services, supra, 658 F.2d at 707.

The affirmative retention provision is certainly limited in duration and scope. The collective bargaining agreement that contains the affirmative retention policy must be ratified periodically. Moreover, the policy provides for call-back of laid-off teachers once those budgetary con-

straints ease. Finally, the policy is necessary to meet the agreed-upon goal of maintaining achieved levels of black faculty representation. Such a voluntary, limited and necessary plan cannot be said to trammel the interests of white employees.

Amici urge that the tests outlined above implement a standard for Equal Protection review appropriate for affirmative action plans entered into by public employers and employees in collective bargaining agreements. Amici further submit that the affirmative retention plan at issue here meets the appropriate standard for Equal Protection both as to ends and as to means.

III. THE AFFIRMATIVE RETENTION PROGRAM IS CONSISTENT WITH THE EQUAL PROTECTION CLAUSE UNDER THE STANDARD ARTICULATED BY JUSTICE POWELL IN BAKKE.

Even under the stricter scrutiny standard set out by Justice Powell in Bakke,

the affirmative retention plan here is sound. In his opinion in Bakke, Justice Powell concluded that an affirmative action plan does not violate the Equal Protection Clause if (1) it serves a sufficiently substantial state purpose or interest, and (2) it is not only reasonable but "necessary... to the accomplishment of its purpose or the safeguarding of its interest." Id., 438 U.S. at 305.[22] In this case, only an affirmative retention provision is in issue, and that provision is necessary to safeguard the substantial interest of the board and the union in maintaining current levels of minority faculty representation

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[22] Justice Powell's requirement that where a finding of past discrimination is necessary, a body competent to make such a finding must do so, is discussed supra in Section II.A.1. and 2. The Jackson Board of Education is competent to make such a finding, and, if this Court determines that one is necessary, the case should be remanded.

in times of budgetary constraints. See infra.

Furthermore, in Bakke, Justice Powell indicated that an admissions program which took race into account without reserving a specified number of seats would be constitutional, because such a program "treats each applicant as an individual." Id., 98 S.Ct. at 2759-60. Here the teachers are individually treated. The teachers themselves bargained for the kind of individual consideration they would receive. Criteria taken into account in determining layoffs included (1) the particular school affected; (2) the seniority of individual teachers; (3) the particular type of position to be eliminated (e.g., physics teacher); (4) whether there is another more junior teacher with the same specialty working at another school who may be "bumped"; and (5) race.

The affirmative retention program the teachers adopted simply aims to safeguard the gains previously achieved by an affirmative action program the hiring goals of which are not under attack. It does so in a sophisticated way, sensitive to the particularized specialties, location and seniority of individual teachers, and to the needs of the student body at particular schools. The program thus does not have the features found objectionable by Justice Powell in Bakke.[23]

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[23] In Bakke, Justice Powell, as well as Justices Brennan, White, Marshall and Blackmun, approved the so-called "Harvard approach," with individualized treatment of applicants and no quantified minority set-aside. "This put a majority of the Court on record that a program which considers race and even the numerical balance of the class, id. at 2765-66 (Powell, J.) (appendix), but which does not set aside a specified number of seats for minorities, is lawful under...the 14th Amendment." The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 136 (1978).

Moreover, there is in this case no Bakke-like simple set-aside of positions for minorities. There is no claim here that candidates are hired in a non-individualized way, again distinguishing this program from the program Justice Powell found unconstitutional in Bakke.

The affirmative retention program here should therefore be held to be constitutional.

A. The Affirmative Retention Program Serves a Sufficiently Substantial State Purpose or Interest.

In Bakke, Justice Powell held that the Board of Regents' interest in attaining a diverse student body was sufficiently substantial to justify a race-conscious remedy, but that the means chosen to achieve that end were impermissible because they were not necessary to its achievement. Id., 438 U.S. at 316. Justice

Powell also concluded that the Board's interest in remedying societal discrimination may have been substantial, but that the Board was not competent to make findings that such societal discrimination existed. Id. at 306.

In this case, the interest of the union and the board in maintaining a racially diverse faculty is substantial even under Justice Powell's standard in Bakke. The board and the teachers agreed, and the Sixth Circuit affirmed, that minority faculty underrepresentation prior to institution of the policy was substantial and chronic. The affirmative retention policy, in addition to serving that substantial interest, also serves the related interests of the union and the board in "promoting racial harmony in the community and providing role models for minority stu-

dents." Wygant, 746 F.2d at 1157. Together, these interests are sufficiently substantial to justify the adoption by the board and the union of the voluntary affirmative retention plan here at issue.

In Morgan v. O'Bryant, supra, the First Circuit upheld a court-ordered affirmative retention program remarkably similar to that under review here. The court had previously ordered that black and white teachers be hired on a one-for-one basis until the percentage of black faculty reached 20%, the approximate percentage of blacks in Boston at that time. Id., 671 F.2d at 24. Faced with a budget crisis, however, and the fact that the existing collective bargaining agreement contained a reverse seniority layoff provision which "would drastically reduce the percentage of black teachers," id., the Boston School

Committee decided that "if layoffs of teachers prove to be necessary, they should be conducted so as to maintain the current percentage of black teachers." Id. at 25. The School Committee filed a motion to approve this decision, the District Court granted the motion, and the First Circuit affirmed the District Court's orders. The Court stated:

> The [school children] have a right to an education in a school system free of racial discrimination in the employment of teachers and staff. ... The elimination of the vestiges of a segregated school system can not be accomplished until the effects of past hiring discrimination have been eradicated. An integrated faculty and staff is also necessary to bring black students and parents fully into the school community and decision-making processes and to counteract their past isolation. A racially balanced faculty also provides black students with role models, which may be "important because they can encourage minority students to higher aspirations and at the same time work

> to dispel myths and stereotypes about their race. ..." We thus conclude that the orders here are remedial: they are designed to make the children whole, to vindicate their rights, and that is indeed their effect.

Id., 671 F.2d at 27-28 (emphasis added). Morgan v. O'Bryant was a desegregation case, and Wygant is an affirmative action case. However, the layoff provision and the goals in each case are nearly identical. The desegregation goals mandated by this Court can only be voluntarily fulfilled by school boards making such findings, and instituting such voluntary plans, as in Wygant. Otherwise, desegregation will be committed to years of arduous litigation. The goals in Wygant were nearly identical to those in Morgan v. O'Bryant, and were sufficiently substantial to meet the strictest standard of review in both cases.

B. The Affirmative Retention Plan is Necessary to Safeguard the Board's Interest in Maintaining Achieved Levels of Black Faculty Representation.

Under Justice Powell's standard in Bakke, the constitutional validity of a race-conscious state program that serves a substantial state interest or purpose, depends on whether the means chosen are necessary to safeguard that interest or to accomplish that purpose. Id., 438 U.S. at 305.[24] In this case, the affirmative retention policy is necessary to safeguard the substantial, constitutionally permissible interest in preserving affirmatively-achieved levels of minority faculty representation in the face of budgetary constraints necessitating teacher layoffs. Tangren v. Wackenhut Services, supra, 658 F.2d at 707 (similar affirmative retention provision held "carefully contoured to accomplish its limited objective--insuring that any reductions in force do not disproportionately impact on minorities.")[25]

Thus, the affirmative retention policy was necessary to safeguard a sufficiently substantial government interest, and Article XII is constitutional even under Justice Powell's stricter scrutiny standard.

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[24] As Justice Powell stated in Fullilove, "this Court has not required remedial plans to be limited to the least restrictive means of implementation." Id., 448 U.S. at 508 (emphasis added). The other opinions in Fullilove adopted a "substantial relation" test, id. at 520 (Marshall, J.) or a "narrowly tailored" test, id. at 490 (Burger, C.J.).

[25] Cf. Morgan v. O'Bryant, supra, 671 F.2d at 27-28 (nearly-identical affirmative retention orders held "necessary to safeguard the progress toward desegregation painstakingly achieved;" without them black representation would have fallen to percentages existing before plan went into effect, and such a result "could not be countenanced." Id., 671 F.2d at 27-28 (citing Green v. County School Board, supra, 391 U.S. at 438-39) (emphasis added).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

Barbara R. Arnwine
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION

John Reinstein
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By Mark A. Michelson (AMS)

APPENDIX A

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

MICHAEL S. DUKAKIS
GOVERNOR

August 21, 1985

Rev. Charles Stith
Leonard Zakim, Esq.
Martin A. Walsh
Co-Chairman
Greater Boston Civil Rights Coalition

Dear Sirs:

It is with pleasure that I write to commend the work of The Greater Boston Civil Rights Coalition (GBCRC), a vital and important force, working for the racial, religious and ethnic equality in the Commonwealth of Massachusetts.

My administration has worked closely with the GBCRC for a number of years to insure maximum equal opportunity for all citizens in the Commonwealth.

The work of the GBCRC exemplifies the benefits that can be obtained from a combination of governmental and private citizen initiated programs.

In the area of affirmative action in employment, the Commonwealth has benefited from the suggestions and assistance of the GBCRC. As a result of our interactions on February 25, 1983 I signed Executive Order 227, setting forth voluntary affirmative action objectives for all job categories in the Commonwealth. The Preamble of Executive Order 227 states

> "The Commonwealth of Massachusetts has led this nation, since its birth, in protecting the rights and privileges of individuals. The Massachusetts Constitution of 1780, which has been a model for other states, is based on a belief in freedom and equality for all mankind, and in the duty of government to safeguard and foster for its people, the enjoyment of these rights.

Our strong commitment to this principle is demonstrated by our strong laws prohibiting discrimination because of race, color, religion, creed, ancestry, national origin, military status, sex, age, and handicap in the areas of employment, education, private and public housing units, commercial property and public accommodations.

But, in spite of these accomplishments, much remains to be done. Many families presently suffer from inadequate income, sub-standard and overcrowded housing, and inferior education and de facto segregation bar them from the better jobs, dwellings and schools. We recognize that any such effects of any illegal past or present discriminatory practices by state appointing authorities must be affirmatively remedied, and that the ratio of racial and sexual makeup of the state work force should at all levels, reflect the ratio of racial and sexual makeup of the population where the jobs exist."

To further our goal of more minority representation, the Commonwealth adopted a minority executive search program to encourage minorities and women to enter governmental employment.

Recently, the GBCRC and I jointly convened a summit of chief executive officers in the private sector to urge that they follow the Commonwealth's example of voluntary affirmative action in employment.

I am proud of the joint achievements and strides made by the Commonwealth and the Greater Boston Civil Rights Coalition working together for the fulfillment of this nation's ideal and commitment to equal opportunity for all.

Sincerely,

Michael S. Dukakis

MSD/msa

APPENDIX B

CITY OF BOSTON · MASSACHUSETTS

OFFICE OF THE MAYOR
RAYMOND L. FLYNN

August 22, 1985

Rev. Charles Stith
Leonard Zakim, Esq.
Martin A. Walsh
Co-Chairmen
Greater Boston Civil Rights Coalition

Dear Sirs:

It is with enthusiasm that I commend the Greater Boston Civil Rights Coalition in supporting the efforts of the City of Boston in striving for equal employment opportunity for all Bostonians.

Your vision, suggested programs and level headed and persuasive approach to the topic of affirmative action has been most beneficial. Since the inception of my administration, the Greater Boston Civil Rights Coalition has been an effective advocate for prioritizing issues concerning equal employment opportunity, especially affirmative action programs.

I have recently created the position of Director of Affirmative Action within the City of Boston. This office has worked closely with the Greater Boston Civil Rights Coalition. We are in the process of adopting an affirmative action plan setting forth hiring goals for racial minorities and women in all job categories. Also, in consideration of proposals made by the Greater Boston Civil Rights Coalition, I appointed a Senior Advisor on Equal Rights to oversee the Civil Rights Department.

It is the commitment of my administration to continue working with the Greater Boston Civil Rights Coalition in promoting programs to urge affirmative action by private employers in Boston.

I am proud of our accomplishments to date and look forward to continued work in the upcoming years in fulfilling our mutual objectives of racial harmony and equal opportunity in the City of Boston.

Sincerely,

Raymond L. Flynn

Raymond L. Flynn
Mayor, The City of Boston